

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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SHAE KEVIN GRAHAM

Plaintiff-Appellee,

v.

SHAREA FOSTER,

Defendant-Appellant

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Supreme Court No.: 152058

Court of Appeals No.: 318487

Lower Court No.: 2013-808521-DP

**APPELLANT'S SUPPLEMENTAL BRIEF**

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## Table of Contents

	<u>Page</u>
Statement of Question Presented	3
Index of Authorities	4
Argument	6
<p><i>I. Plaintiff-Appellee should not be allowed to add Christopher Foster as a necessary and correct defendant after the statute of limitations has expired; as the addition does not relate back to the original complaint. The order issued by the lower Court should be reversed as a violation of MCR2.118(D), and the holding in the <u>Miller v Chapman Contracting, 477 Mich 102, 105 (2007)</u>.</i></p>	
Conclusion	13
Relief Requested	13
Constitutional Provisions, Statutes, and Court Rules Cited	14
Proof of Service	14

**Statement of Question Presented**

- I. Did The Court of Appeals correctly hold that a necessary-party defendant may be brought into a lawsuit after the expiration of the limitations period based on the relation-back doctrine?**

Appellant's Answer: No.

**Index of Authorities**

	<u>Page</u>
<u>Miller v Chapman Contracting, 477 Mich 102, (2007)</u>	5
<u>Wells v Detroit News, Inc, 360 Mich 634, 641; 104 NW2d 767 (1960)</u>	5
<u>Daly v Blair, 183 Mich 351, 353; 150 NW 134 (1914)</u>	5
<u>Detroit Independent Sprinkler Co v Plywood Products Corp, 311 Mich 226, 232(1945)</u>	5
<u>Aastad v. Edwards, No. 293101, 2010 Mich. App. LEXIS 2229, (Mich. Ct. App, Nov. 18, 2010)</u>	5
<u>Employers Mut. Cas. Co v. Petroleum Equipment, Inc, 190 Mich (1991)</u>	6
<u>JMC I LLC, v. City of Grand Rapids, No. 320483, 2015 Mich. App. LEXIS 953 (May 12, 2005)</u>	6
<u>Casserly v Wayne Circuit Judge 124 Mich 157, 161 (1900)</u>	7
<u>Prather Eng. Co. v. Detroit, Flint &amp; Saginaw Railway 152 Mich. 582 (1908)</u>	8
<u>Godfrey Lumber Co. v. Kline, 167 Mich. 629</u>	10
<u>INS v Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987)</u>	10

### Argument

The Plaintiff-Appellee's failure to name the minor child's legal/acknowledged/affiliated/presumed/alleged father, Christopher Foster, as a defendant in his complaint, prior to the expiration of the statute of limitation, is a fatal error and precludes the court from issuing an order granting the Plaintiff-Appellee any of the relief that he seeks. The addition of a defendant does not relate back to the original complaint, and therefore must be joined in the complaint prior to the expiration of the statute of limitations. as required by MCR 2.118(D), Miller v Chapman Contracting, 477 Mich 102, (2007). Therefore, the portion of the Court of Appeals decision allowing for the addition of Christopher Foster should be reversed. The lower court misapplied the law, in holding that Christopher Foster may be brought into a lawsuit after the expiration of the statute of limitation period based on the relation-back doctrine.

The cases offered in the February 5, 2016, Order of this Honorable Court are discussed comparatively. In the case at bar, the parties and both lower courts have formally assessed the relation-back doctrine and its relationship to the parties in the instant case. The most recent and applicable Supreme Court decision that addresses the issues presented, in the case at bar, is Miller, 477 Mich 102. The *Miller* decision addressed the relation-back doctrine and its holding is clearly applicable to the case at bar. In *Miller*, the Plaintiff named the wrong party in the complaint by failing to name the bankruptcy trustee. The Court determined that the bankruptcy trustee was a necessary party, and rejected the Plaintiff's argument that adding the bankruptcy trustee was merely correcting a misnomer. Further, the Court held that the misnomer doctrine only applies to 'correct inconsequential deficiencies or technicalities in the naming of parties. The *Miller* Court went on to clarify what constitutes a misnomer, and stated: "[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party,

although by a wrong name...’ ” *Miller, at p.107*, citing, *Wells v Detroit News, Inc*, 360 Mich 634, 641; 104 NW2d 767 (1960), quoting *Daly v Blair*, 183 Mich 351, 353; 150 NW 134 (1914); see also, *Detroit Independent Sprinkler Co v Plywood Products Corp*, 311 Mich 226, 232; 18 NW2d 387 (1945) (allowing an amendment to correct the designation of the named plaintiff from "corporation" to "partnership").

In rejecting the Plaintiff’s request to add the bankruptcy trustee, the *Miller* Court also specifically addressed the application of MCR 2.118(D), and the expiration of the statute of limitation, stating: “MCR 2.118(D) specifies that an amendment relates back to the date of the original pleading only if it "adds a claim or a defense"; it does not specify that an amendment to add a new party also relates back to the date of the original pleading. Consequently, the Court of Appeals correctly affirmed the judgment of the trial court that the amendment to substitute plaintiff’s bankruptcy trustee as plaintiff after the expiration of the period of limitations would be futile. Therefore, the decision of the Court of Appeals is affirmed.” *Miller, at 105*.

Notably, over thirty Michigan Court of Appeals cases have relied on legal analysis outlined in *Miller* as precedent when deciding cases regarding the addition of parties after the statute of limitations has run. See, *Employers Mut. Cas. Co. v. Petroleum Equipment, Inc.*, 190 Mich App 57, 63; 475 NW2d 418 (1991), holding “[a]lthough an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction or occurrence set forth in the original pleading. MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties”; *JMC I LLC v. City of Grand Rapids*, 2015 Mich. App. LEXIS 953 stated: “ an amendment that adds a new party does not relate back, and petitioners cite no authority that would allow the MTT (Michigan Tax Tribunal), or require this Court to compel the MTT, to grant a motion effectively circumventing both the relation-back

doctrine and the statutory deadlines governing the MTT's exercise of jurisdiction; "Aastad v. Edwards, 2010 Mich. App. LEXIS 2229, noting that "the relation-back doctrine does not extend to the addition of new parties."

As repeatedly decided by the Michigan Supreme Court and the Michigan Court of Appeals, the failure to name the necessary party does not relate back to the original complaint or any of the claims asserted as required by MCR 2.118(D), and Miller v. Chapman. Naming the correct parties in a lawsuit is a primary component of any legal action regardless of the dispute. Allowing for the addition of Christopher Foster to the case after the expiration of the statute of limitation directly affects the rights of the Defendant-Appellant. This addition would allow the Plaintiff-Appellee to circumvent the plain language of the Revocation of Paternity Act, and would revive his otherwise fatally flawed cause of action. This addition would allow the Plaintiff-Appellee to be prejudicially enriched, despite having not complied with the filing requirements set-forth in the statute, and thus obviating the clear and plain language of the law, and providing him with 'a second bite at the apple.'

To allow for the addition of Christopher Foster to this case at this late date: would overturn thirty (30) years of legal precedent, would invalidate MCR 2.118(D), would ignore the legislative intent and the plain language of the Revocation of Paternity Act's statute of limitation. The Plaintiff-Appellee's failure to take the necessary steps to secure his ability to challenge the paternity of the minor child does not warrant such an extreme outcome. Defendant-Appellant and Christopher Foster should not be required to suffer another day with their parental rights to their child in jeopardy. The Defendant-Appellant should not be required to remain in limbo about the status of her family because of the Plaintiff-Appellee's failure.

As instructed by this Court, Defendant-Appellant has also reviewed older cases decided at the turn of the century. Specifically, Casserly v Wayne Circuit Judge 124 Mich 157, (1900), which was decided several decades before the legislature enacted MCR 2.118(D) and therefore is not applicable guidance for the case at hand. Most notable is the fact that there have been no cases decided by the Courts that have relied on Casserly, in cases involving the application of MCR 2.118(D), therefore, Casserly is not instructive.

In Casserly, the complainant, Union Trust initially failed to name a contractor, and requested the ability to amend the original complaint adding the contractor as a new defendant. The Court agreed with Union Trust's reasoning that adding a "a new party defendant in no way changed the cause of action as stated in the bill, and in no way affected defendant's rights." Casserly, at 161. The Casserly court addressed the timing of Plaintiff's application to amend the complaint holding that, "the fact that the principal contractor was not made a party to the bill until after the year had expired cannot affect the rights of complainant." Casserly, at 162.

The Casserly court's decision, in a mechanic's lien case, to allow for the addition of a defendant was based on its conclusion that defendant's rights are not affected. In Casserly, the parties dispute is over money owed for separate services rendered by each of the contractors. The facts in Casserly are not legally or factually analogous to the parties in the instant case. Assuming arguendo that the Plaintiff-Appellee were successful in litigating this case, the Foster family, including Defendant-Appellant's legal right to the minor child will be significantly altered. The impact on Defendant-Appellant's is manifest. She will have less time with her child, her child will be influenced by and exposed to people and environments that are beyond her control, and an entire familial disruption will occur. This impact cannot be denied.



Also reviewed for the purposes of this supplemental briefing, is the Court's decision in Prather Engineering Co. v. Detroit, Flint & Saginaw Railway 152 Mich. 582; 116 N.W. 376; 1908 Mich. LEXIS 893. This case also involves a mechanic's lien and also relies on statute 3 Comp. Laws, § 10718 (Michigan) when assessing the timeliness of adding affected parties and it states:

“ . . . a mechanic's lien shall continue for a year, and no longer, unless chancery proceedings are begun to enforce it. By section 10719 of the statute it is required that complainant shall make all persons having rights in said property affected or to be affected by such liens so filed parties to such action. If the bill is filed in season, an amendment bringing in a proper party may be made after the year has expired, and an objection that the bill is not verified may be met by amendment after the expiration of the year.”

The *Prather* Court held that a party that is affected by liens can be added to the complaint up to one year after the expiration of the original complaint. The timeliness of the filing is key to the Courts interpretation of Section 10719 of this 19<sup>th</sup> century statute. The clear and definitive differences between *Prather* and the instant case make *Prather* inapplicable. *Prather* dealt with the ability of a party that was affected by a mechanic's lien to be added to a lawsuit, so long as the original case was filed timely. The statute relied upon in *Prather* specifically tolls the statute of limitation, and allows for the addition of a party so long as the complaint was filed timely. In the case at bar, the Revocation of Paternity Act provides for no such tolling., and specifically states in relevant part:

An action under this section shall be filed within 3 years after the child's birth or within 1 year after the effective date of this statute, whichever is later. *MCL 722.1431 et seq.*

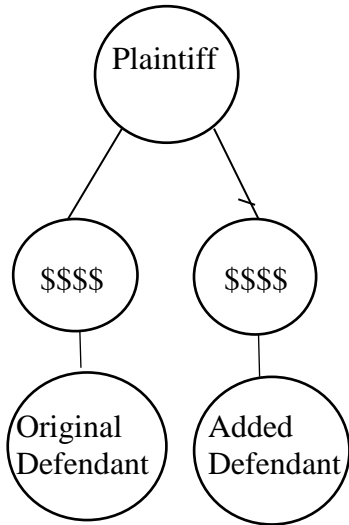
The plain language of this statute does not allow for an interpretation consistent with that of *Prather*. There is nothing in RPA that could be interpreted to allow for the tolling of the statute of limitation when the original case was filed timely. The RPA is clear and unequivocal. As such, *Prather* is not instructive.

Also of note, is the fact that *Prather* has only been used once as precedent for the interpretation of Mich. 3 Comp. Laws § 10714. In *Godfrey Lumber Co. v. Kline*, 167 Mich. 629. this Court held that mechanics' lien statutes regarding the attachments of a lien were to be strictly construed. This lone case, decided in 1908, should have no impact on the Court's analysis of the law in this case. Both *Casserly* and *Prather* are cases over 100 years old, and their holdings are easily distinguished, both legally and factually, from the case at bar. It would be a complete miscarriage of justice for this Court to rely, in any way, on these cases.

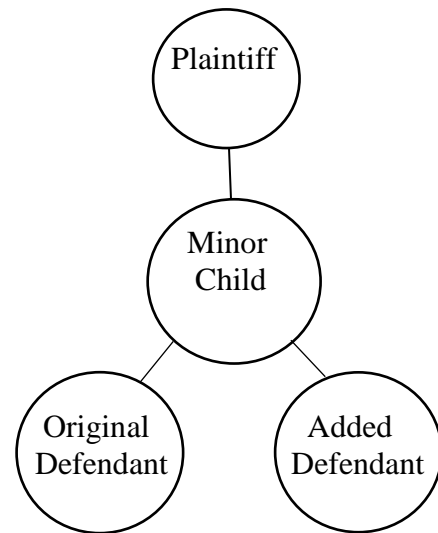
The RPA, Michigan Court Rules, decades of well-settled jurisprudence and the facts in the instant case lend themselves to this Court reliance upon century-old common law. A current and relevant statute, MCR 2.118(D) exists in order to direct courts and citizens to follow the law that has been enacted by the legislature. It is well settled that if the legislature wanted to create exceptions or alternatives in the law those caveats would be included. "Judges interpret laws rather than reconstruct legislator; intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *INS v Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987). MCR 2.118(D) was enacted in 1985 and supplants the holdings in both *Casserly* and *Prather*. This Court Rule has guided over 30 years of civil procedure and has been interpreted by the Supreme Court numerous times. Utilizing century old common law to interpret and override current codified law would overturn decades of well- settled law and should not be the direction of the Court.

In attempting to further articulate the stark differences between the factual scenarios outlined in *Casserly* and *Prather* and juxtapose them with the facts of the case at bar, we believe the following diagram is instructive.

*Figure 1*  
*Casserly and Prather*



*Figure 2*  
*Graham v. Foster*



The legal positions of the parties in *Casserly* and *Prather* are not remotely similar to the parties in the case at bar, as reflected in the diagram on the following page. As reflected in Figure 1, when the *Casserly* and *Prather* Courts allowed for the addition of the Added Defendant, after the expiration of the statute of limitations, there was a legitimate argument that the addition of the Added Defendant did not impact the Original Defendant or the debt that existing defendant owed to the Plaintiff. That analysis is not applicable to the facts and the nature of “dispute,” in the instant case. As demonstrated in *Figure 2*, Original Defendant and Added Defendant are intertwined and connected through the existence of the minor child, a person, that cannot be partitioned. Their parental rights to the minor child cannot be alienated or affected

without both parties being named in the lawsuit. As such, any ruling by this Court that negatively impacts the Added Defendant likewise impacts the Original Defendant.

Blake Foster is a child whose livelihood and overall well-being hinges on the consistency of a strong and supportive family structure which he's receives as part of the Foster family. This child's live cannot be compared to a mechanic's lien. This minor child is fully provided for by both his mother and his father, Christopher Foster. Adding Plaintiff-Appellee to the familial structure and stripping Christopher Foster of his legal-parental rights is not in the minor child's best interest as found in MCL 722.23 (a)-(l).

The best interests of children are typically determined using a multifaceted analysis that assesses the love, affection and emotional ties existing between the parties involved with the child. Those factors include: bonding, time spent with the child, meal preparation, bathing/grooming time and affection. An analysis of these factors lead to only one conclusion; it is not in the best interest of Blake Foster to have his world up-ended and compromise the parental bond that has been established with his father, Christopher Foster.

### **Conclusion & Relief Requested**

Christopher Foster's omission from the original pleadings is not a misnomer. Allowing the Plaintiff-Appellee to add Christopher Foster to his complaint, at this late date, is not only a violation of MCR 2.118(D), the statute of limitations outline in the RPA, but also decades of well-established jurisprudence. For these reasons, this Court should reverse the lower Court and prohibit the futile addition of Christopher Foster as violative of the applicable statute of limitation.

**Constitutional Provisions, Statutes, and Court Rules Cited**

MCL 722.1438(1)

MCL 722.23 (a) – (l)

MCL 722.1438 (1)

MCR 2.118 (D)

3 Comp. Laws, § 10718 (Michigan)

March 17, 2016

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**Proof of Service**

On March 17, 2016, I served via e-file and regular mail a copy of the Appellant's Supplemental Brief, and Proof of Service upon the attorneys of record and/or parties in this case on. I declare the foregoing statement to be true to the best of my information, knowledge and belief.

\_\_\_\_\_/s/ Tammy Daniels  
Tammy Daniels